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MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No. 77-81

RICHARD NIXON,

Petitioner,

v.

RONALD V. DELLUMS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' REPLY BRIEF

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1. In opposing the petition for certiorari in this case, respondents erroneously state that ". . . the Court of Appeals and the District Court gave Nixon's claim [of presidential privilege] at least the same weight as did the Court in *Nixon v. Administrator*." Brief in Opposition, p. 3. Respondents arrive at this faulty conclusion by relying on their out of context reference to this Court's statement in *Nixon v. Administrator* which explained that Mr. Nixon's contention that the Presidential Recordings and

Materials Preservation Act intrudes upon the independence of the Executive Branch was undercut by the fact that President Ford signed the legislation and the Solicitor General under President Carter vigorously supported its constitutionality. *Nixon v. Administrator, et al.*, ____ U.S. ____, 45 U.S.L.W. 4917 (June 28, 1977). This Court did not hold — as respondents would have its opinion interpreted — that a former President's assertion of the privilege is automatically entitled to lesser weight. To the contrary, as we noted in our petition, this Court expressly adopted the position set forth in the Solicitor General's brief which stated that the vitality of the confidentiality privilege must be measured in decades and is not dependent upon whether the person asserting it happens to be the current or a former Chief Executive. The Court of Appeals' "automatic lesser-weight" analysis is contrary to this Court's later treatment of the issue and should not be permitted to stand uncorrected in view of the numerous cases pending in various district and appellate courts which will likely adopt the Court of Appeals' erroneous approach if certiorari is not granted.

2. Respondents contend that Supreme Court review at this juncture is premature because a search of the 25 days of presidential conversations has not taken place *and* if after a search any conversations are found that are relevant to the respondents' demands, petitioner can reassert his objections to production of the recordings. Respondents miss the point. In *United States v. Nixon*, 418 U.S. 683 (1974), this Court concluded that a President's need for confidential discussions with his advisers warrants a presumptive privilege against demands for disclosure. To overcome that presumption the Special Prosecutor was required to demonstrate preliminarily a compelling need for the material *and* to particularize his request. Here, in the context of a much less compelling showing of need

arising in the context of civil litigation, the Court of Appeals has condoned an exhaustive review of twenty-five days of presidential conversations; a review that will entail intrusions into the confidentiality of innumerable matters wholly irrelevant to respondents' demands. Conceding that the respondents have not established that relevant conversations even occurred, the Court of Appeals concluded that it was sufficient for respondents to show that "it is highly likely that such conversations did take place" (Pet. App. E, p. 21a). This standard of particularization cannot be reconciled with the requirements established by this Court in *United States v. Nixon, supra*. Moreover, respondents fail to address the question of whether the constitutionally-based privilege of confidentiality designed to foster the free-flow of presidential communications should be deemed merely presumptive in the context of a civil litigant's desire for disclosure of Oval Office deliberations, and if so, whether the presumption should be stronger than in the context of demands for evidence in criminal cases. Those issues clearly warrant this Court's consideration in view of the pending suits referred to in our petition.

For the foregoing reasons, and those stated in our original petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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